MUTHUKARPAN IRLANDI

v.

DEPUTY PUBLIC PROSECUTOR & ANOR

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CRIMINAL APPEAL NO: 41-124-2000]
30 JANUARY 2002

CRIMINAL PROCEDURE: *Disposal of property - Property seized, disposal of - Money seized pursuant to arrest for theft - Rightful owner - Criminal Procedure Code, s. 413(1)*

The second respondent was a Bangladeshi employed by the appellant. The former was arrested and found guilty under s. 381 of the Penal Code for stealing from his employer. Money amounting to RM17,000 was found in his room and seized. The magistrate had ordered that the second respondent was the rightful owner of the sum in question. The appellant appealed to this court against the said decision. The issue before this court was whether the sum seized from the second respondent belonged to him or the appellant.

Held:

[1] Under s. 413(1) of the Criminal Procedure Code, the phrase "… to the person entitled to the possession of it ..." meant that notwithstanding the fact that the possession of the property was with the accused, the court could order its delivery to any person, including the owner, if it was satisfied that he was the person entitled to its possession. As the second respondent was on bail, s. 20 of the CPC was inapplicable. Thus the magistrate had relied upon the remaining provision of s. 413. (p 483 d-f)

[2] There was no evidence to prove as to how the second respondent had acquired the RM17,000. It was concluded, based on the facts, that he had pilfered goods from the appellant and deposited its sales proceeds into his bank account. The second respondent had opened the said account fictitiously by using one of the two passports he possessed and later transferred the funds into another account to legitimise his ill-gotten wealth when he intended to leave the country. (p 481 f-i)

[3] The money actually belonged to the appellant. He had maintained this in his second police report although the police officer in question did not investigate the matter further. (p 482 c)

[Appeal allowed. Decision of magistrate set aside.]

Legislation referred to:
Criminal Procedure Code, ss. 20, 413(1)
Penal Code, s. 381

For the appellant - M Athimulan (SP Raman); M/s Athimulan & Co
For the respondent - Azman Abu Hassan, DPP
For the 2nd respondent - Darshan Singh

Reported by M Maheswaran

JUDGMENT

RK Nathan J:

Facts

The 2nd respondent was charged Magistrate's Court for an offence under s. 381 of the Penal Code. He was found guilty and sentenced to ten months' imprisonment. The 2nd respondent, a Bangladeshi, was employed by the appellant who was dealing in watches. The charge to which the 2nd respondent pleaded guilty was this:

> Bahawa kamu pada 23hb. September 1998, jam lebih kurang 6.00 petang, di gerai No. 10 Jalan Pantai Emas Batu Feringghi, dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, sebagai orang gaji oleh seorang bernama Muthukarpan a/l Irlandi K/P 470707-07-5599, dengan niat curang telah mencuri (21) utas jam tangan pelbagai jenama berharga lebih kurang RM400 kepunyaannya, oleh yang demikian itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 381 Kanun Keseksaan.

The facts relating to the charge which the 2nd respondent admitted to are as in exh. P1 which read as follows:

> Jam lebih kurang 6.00 petang 23/9/98 pengadu telah membuat pemeriksaan barang-barang perniagaan di kedainya No. 10, Jalan Pantai Emas, Batu Feringghi, Pulau Pinang, setelah buat pemeriksaan pengadu dapati sejumlah jam tangan pelbagai jenama telah berkurangan, pengadu telah percaya pekerjanya iaitu lelaki Bangladesh telah mengambil jam tangan tersebut seterusnya pengadu segera buat laporan polis seperti Batu Feringghi Repot: 955/98.
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> Jam 10.55 malam 24/9/98, bertindak di atas maklumat yang diterima sepasukan anggota polis yang diketuai oleh Insp. Suresh dari Cawangan D7 IPD T/Laut, Pulau Pinang, telah membuat serbuan di Bilek No.5, Rumah No.1713, Batu Feringghi, Pulau Pinang dan terus tahan satu lelaki Bangladesh (OKT) serta buat pemeriksaan di dalam bilek tersebut dan terdapat 21 utas jam tangan pelbagai jenama di bawah sebuah rak, seterusnya OKT ditangkap serta rampas jam tangan dan seterusnya buat repot tangkap bersangkut dengan kes kecurian

jam tangan seperti laporan yang dibuat oleh pengadu di dalam kes ini. Siasatan polis dan berdasarkan kepada keterangan dari OKT telah mendapati OKT melakukan kesalahan seperti di Pertuduhan.

The appellant lodged two police reports relating to this case. The first report dated 24 September 1998 (Batu Ferringhi Report 955/98) was a brief report. The 2nd respondent was arrested on that day. Subsequently the appellant lodged a second report on 7 October 1998 (Batu Ferringhi Report No. 1019/98) which contained a full report alleging that the 2nd respondent had removed stolen goods from his shop to a tune of RM40,000 and had been depositing money in the Ban Hin Lee Bank and that he had suddenly closed the account and had withdrawn all the money in that account and had secreted RM17,000 in his room. The appellant/employer had provided accommodation for the many Bangladeshis whom he had employed. Whilst the 2nd respondent was being detained by the police the appellant instructed one of his employees named Rofi to search the accused's room. On conducting the search Rofi found RM17,000 under the carpet. The appellant gave the said money to his wife for safe keeping. She however had used the said money; but when the police approached the complainant, he returned the said sums to the police. After the 2nd respondent's conviction, he together with the appellant laid claim to this sum. The magistrate then ordered an enquiry to be held pursuant to s. 413(1) of the Criminal Procedure Code ('the CPC') as to who ought to receive the sum of RM17,000. At the conclusion of the enquiry in which witnesses for both parties testified, the learned magistrate ordered the said sum to be given to the 2nd respondent as being the rightful owner of the said sum. The appellant who was the first claimant before the learned magistrate filed a notice of appeal against that decision. The 2nd respondent then applied by motion (encl. 8) to be made a party to the appeal. On 9 November 2001 I heard the motion and granted the 2nd respondent the right to intervene and to be made the 2nd respondent in this appeal. In encl. 8 Mr Darshan Singh had three other prayers. He abandoned the prayer to dismiss the appeal but asked for a stay of two other prayers, namely the prayer seeking an order for the said sum of RM17,000 paid into court to be paid to Darshan Singh & Company as solicitor for the 2nd respondent and for an order for costs, until the disposal of this appeal.

The Evidence

The appellant testified at the enquiry and contended that he was told by his supervisor Vello that the 2nd respondent had withdrawn a large sum of money from his bank account. Vello knew this because he had accompanied the 2nd respondent to the said bank because there was a discrepancy in the 2nd respondent's name. The appellant who was the 2nd respondent's employer accused the 2nd respondent of stealing his goods little by little and disposing

of them and depositing the money. He then asked the 2nd respondent to return the money to avoid trouble. The 2nd respondent promised to return the money but failed to do so. The appellant then lodged his police report. He then testified that one of his emloyees, one Rofi, discovered the sum of RM17,000 under a carpet over which a cabinet had been placed, when Rofi was clearing up the 2nd respondent's room which was one of the 17 rooms he had rented out to the Bangladeshi workers under him. When the police later demanded the said sum he surrendered it to them. He kept the money because he believed it was part of the sum stolen from him. The 2nd respondent was paid initially RM300 per month as salary and this was raised progressively to RM600 per month. He was then cross-examined by Mr Darshan Singh who put to him that the appellant had not lodged a police report regarding the loss of RM17,000. Now this certainly is not correct because in the second police report the appellant had lodged, he had clearly referred to the RM17,000. In fact he had even stated in that report that he had accused the 2nd respondent of having stolen the said sum from him. He informed the court during cross-examination that he had lost goods progressively to the tune of RM20,000 and knew that they were being stolen, but he didn't know that it was the 2nd respondent who was responsible. The next witness called at the enquiry was a bank officer who testified that the 2nd respondent had two names namely, the name as stated in this appeal and another name of Monir Hossain. The bank account was in the name of Monir Hossain. When the 2nd respondent closed the said account he withdrew the entire sum which was RM19,083.97. However, having closed that account under the name of Monir Hossain which name tallied with a copy of the passport he produced, he then opened another account in the name of Anower Hossen and again he produced another passport with this name. This court is unable to understand how a bank officer from Ban Hin Lee Bank who admitted knowing that the 2nd respondent had two passports never reported this matter to the police or to the Immigration. Had he done so the relevant authorities could have investigated into this matter it is indeed serious for a citizen of a country to possess two passports with different names issued by that same country. Every citizen of this country owes a duty, if he has such knowledge, to bring such knowledge to the attention of the relevant authorities. In this case the bank officer told the court that when he asked the 2nd respondent why he had two passports, the supervisor who accompanied the 2nd respondent said that the 2nd respondent had lost his passport. Yet again I cannot understand why this officer did not ask him as to why he did not continue to use the earlier name. The 2nd respondent gave evidence as the third witness to the enquiry. He testified that he earned RM400 whilst working at a batik shop. His employer was the present appellant. He had informed the appellant of his desire to return to Bangladesh and he thus went to the Ban Hin Lee Bank with his supervisor,

Vello and withdrew the entire sum of RM19,083.97. On returning to his room he kept the money under the carpet. On that same day at about 9pm whilst he was working in the restaurant he was arrested by the police. Whilst he was being remanded he had informed the investigating officer Sergeant Mohd Zain that he had kept that money under the carpet. When he and the Sergeant went to his room to look for the money, it was not there. He denied having stolen the money. He admitted depositing into his account the following

October 1996	– RM2,800
November 1996	– RM300
December 1966	– RM15.80
February 1997	– RM4,610
March 1977	– RM2,950
April 1997	– RM4,000
Jun 1997	– RM1,672.01
July 1997	– RM1,850
August 1997	– RM1,400
September 1997	– RM1,700
October 1997	– RM1,600
November 1997	– RM1,750
December 1997	– RM3,100

Under cross-examination by counsel for the appellant he admitted entering Malaysia "dengan paspot asal nama Anower Hossen". He also admitted an agent prepared the second passport for him after he had lied to the agent that he had lost his earlier passport. He also admitted that he did not have to go to the Bangladesh High Commission to obtain a fresh passport. He testified that on more than 100 occasions he had bought US dollars at the exchange rate of 2.5 and that on each occasion he would exchange up to US dollars 200. When he doesn't exchange he saves in this account. On a simple calculation therefore he would have bought (100 x 2.5 x 200) RM50,000 in US dollars. He also said in evidence that he did not send any money to Bangladesh. Therefore on his own admission he ought to have at least RM69,083 (50,000 + 19,083). He denied under cross-examination the contents of the appellant's 2nd report which stated that he had admitted to stealing the RM17,000 and that he had promised to return the same and that upon his failure to do so the appellant had reported the matter to the police. The fourth

witness called at the enquiry was the wife of the appellant. She testified that the amount of money spent on recruiting the 2nd respondent which amounted to RM1,950 in 1996, RM2,200 in 1997 and RM1,990 in 1998, were all recovered from the 2nd respondent by monthly deductions from his salary. There was also a monthly deduction of RM100 for his room. His dinner was provided free of charge. When Sergeant Mohamad Zain went to her house and asked for the RM17,000 she gave it to him. She did so because her husband was detained with regard to this sum and he told her to give it. She said it was her own money which had accrued after two or three days of sales from their two shops. She said both the shops could generate earnings of between RM5,000 to RM6,000 per day. She agreed to produce their bank statements but unfortunately I note from the notes of proceedings that neither party took her challenge seriously. She was never directed to produce these documents although Mr Darshan Singh made an attempt to ask for them he didn't insist on their production before submission. In the circumstances I must conclude that this evidence of the appellant and his wife's earnings from both the shops remained unchallenged. In re-examination she clarified this issue of the RM17,000. Her husband was detained in respect of the said sum after the 2nd respondent had told the Sergeant that he had kept RM17,000 under the carpet. The investigating officer Sergeant Mohamad Zain was the fifth witness called at the enquiry. He testified that after the 2nd respondent was investigated and before he was charged he asked to be taken to his room to take some of his belongings. Upon arriving at this room and after looking under the carpet, he found his money missing. He then informed the Sergeant of this fact. The Sergeant was informed by the 2nd respondent's neighbour from the adjoining room, that after the 2nd respondent was arrested, the appellant and another worker had entered the room and cleaned it. The Sergeant then called for the appellant and although he denied any knowledge of the said sum, subsequently the appellant directed his wife to give the said money to the Sergeant. The Sergeant was totally unaware of the second police report lodged by the appellant because no one brought it to his attention. He only saw it after the 2nd respondent was sentenced. He admitted that he would have investigated the matter further if he had been referred the report, earlier. Till today he confirmed that there was no investigation in respect of the 2nd report lodged by the appellant. When he accompanied the 2nd respondent to his room the same worker Rofi who was alleged to have discovered the money and handed it over to the appellant was there and according to the Sergeant this Rofi searched the room including under the carpet and found the money. The Sergeant is alleged to have made a report, presumably produced as P6 (Batu Ferringhi Report No. 1003/98) but this report was never exhibited during this appeal, although marked as item 6 in the rekod rayuan tambahan. Since neither party made an issue of this, I will totally ignore any reference to this report as I do not have the benefit of reading the said report.

Findings Of The Court

Having adjourned the matter after hearing lengthy submissions from both parties the learned magistrate found that the 2nd respondent was the lawful owner of the said sum of RM17,000. In the meantime, as soon as he had completed his sentence the 2nd respondent was sent back to Bangladesh. In order to be able to maintain and to proceed to contest his appeal, the 2nd respondent applied to have the donee of his power of attorney to represent him. With no objections from the appellant, I granted an order in terms for the donee of the power of attorney, one Abdur Rahim, a Bangladesi presently in Malaysia, to represent the 2nd respondent in respect of this appeal.

The appeal record was also served on the attorney general who was made the 1st respondent in this appeal. However, Encik Azman Abu Hassan for the attorney general informed the court that the attorney general had no interest in this appeal and would accept the decision of this court.

The first thing that I ought to consider is whether a person who is guilty of a serious offence can benefit out of such guilt. In this case the 2nd respondent admitted he lied and cheated an agent to obtain a different passport. His explanation for this conduct of his was that he had lost the earlier passport. This court cannot accept this simple explanation. Anyone who loses his passport would firstly lodge a police report, then report such loss to his own High Commission (if he was in a foreign land and obtain a duplicate passport in that same name to which the original passport was issued. But in this case the 2nd respondent not only did not report to his High Commission, he saw an agent, who created a second passport for him. He must know that this is totally improper and an illegal act. Why did he do that? Although he has not given any satisfactory explanation, it is easy to deduce why. He admitted entering this country under the original name of Anower Hossen as stated in the original passport. However the bank account which he opened at the Ban Hin Lee Bank was in the fictitious name of Monir Hossain. This was all pre-planned. Whilst lying that he had lost his original passport, he deliberately opened this bank account under this fictitious name in order to deposit money into this account. When the time was ripe for him to leave the country he closed the account in the fictitious name and opened an account in the original name with a deposit, to legitimise these ill-gotten funds.

On the 2nd respondent's own calculation he ought to have had a sum of RM69,083 all saved within the time of his employment in Penang since 1996 to the time of his arrest in 1998 when his income was only RM800. I am satisfied that the 2nd respondent was in fact pilfering goods from the appellant and disposing them and depositing the money obtained from such sales of the appellant's goods into his bank account. He had given no satisfactory explanation as to how he could come by the RM17,000.

On the other hand what must have happened was that when the appellant and his worker cleaned up the 2nd respondent's room after his arrest, they discovered the RM17,000 and had decided to keep it to offset the money which the appellant believed the 2nd respondent had stashed away after disposing some of the appellant's goods. The appellant had given the money to his wife who must have used it in the course of running both the shops. When the 2nd respondent admitted to the sergeant that he had kept RM17,000 under the carpet and when the sergeant threatened to arrest the appellant, he directed his wife to return the said money. Since she had already used up the original RM17,000 she replaced it with her own money which was the proceeds earned from the two shops. It is clear that the money actually belonged to the appellant. He had maintained this in his second police report but for reasons best known to him the Sergeant did not investigate this report. Although he said in evidence that he didn't know of this report until after the 2nd respondent was sentenced, his explanation has left many questions unanswered. The second report links the first report. The appellant said in the second report as follows: "Saya buat laporan tambahan polis ini bersangkut dengan laporan polis saya pada 24/9/98 Batu Feringghi Report No. 955/98". Surely with such a linkage the person receiving the report must have referred it to the investigating officer. Why did he choose not to investigate the second report. Further why was his own report marked P6 (Batu Feringghi Report 1003-98) not produced to this court? The evidence of the appellant's wife was to the effect that in two - three days they could earn RM17,000. Whilst she agreed to produce the bank statements to substantiate this, she was never ordered to produce them. The 2nd respondent ought not to have entered into submissions without asking the court to direct the wife, to produce the bank statements. In the circumstances the evidence shows that the appellant was earning a substantial sum. Whilst the appellant could not positively say that the 2nd respondent had stolen his goods, the 2nd respondent himself could not explain satisfactorily how he accumulated the said sum of RM17,000.

It is necessary to look at s. 413(1) of the CPC which reads as follows:

> 413.(1) The seizure or finding by any police officer of property taken under section 20 or alleged or suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence shall be immediately reported to a Magistrate, who shall make such order as he thinks fit respecting the delivery of such property to the person entitled to the possession of it, or, if such person cannot be ascertained, respecting the custody and possession of such property.
>
> (ii) ...
>
> (iii) ...
>
> (iv) ...

Section 20 of the CPC reads as follows:

20. Whenever a person is arrested:

(a) by a police officer under a warrant which does not provide for the taking of bail or under a warrant which provides for the taking of bail but the person arrested cannot furnish bail; or

(b) without warrant or by a private person under a warrant and the person arrested cannot legally be admitted to bail or is unable to furnish bail,

the police officer making the arrest or, when the arrest is made by a private person, the police officer to whom the private person hands over the person arrested may search such person and place in safe custody all articles other than necessary wearing apparel found upon him, and any of those articles which there is reason to believe were the instruments or the fruits or other evidence of the crime may be detained until his discharge or acquittal.

In this case since the 2nd respondent was on bail s. 20 could not have applied. Therefore the learned magistrate must have acted on the remaining provision in s. 413(1) of the CPC that is that he must have been under the belief that the sum of RM17,000 was "suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence." It is only under such a situation that the learned magistrate acts under s. 413(1) of the CPC.

To my mind the words in s. 413(1) that are most relevant towards the disposal of the said property are "to the person entitled to the possession of it". This means that notwithstanding the fact that the possession of the property was with the accused, the court could order its delivery to any person, including the owner, if the court was satisfied that he was the person entitled to the possession of it.

Having considered all the facts of the case it is my judgment that this appeal must be allowed. The judgment of the lower court declaring the 2nd respondent as the person entitled to the possession of the said sum is set aside. I therefore order that the person properly entitled to the sum of RM17,000 is the appellant.